No. 15 2005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 2004

CLAUDINE WOOLF,
an individual,
Petitioner,
v.
MARY KAY INC.,
a Delaware Corporation,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals, Fifth District of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI

ANGELA ALIOTO
STEVEN L. ROBINSON
Law Offices of Joseph L. Alioto & Angela Alioto
700 Montgomery Street
San Francisco, CA 94111
(415) 434-8700
Counsel for Petitioner

LAWRENCE ALIOTO
582 Market Street, Suite 607
San Francisco, CA 94104
(415) 399-0533
Co-Counsel for Petitioner

PAMELA PITT
22 Battery Street, Suite 1000
San Francisco, CA 94111
(415) 291-9251
Co-Counsel for Petitioner

QUESTIONS PRESENTED

Did the Texas Court of Appeals deny Full Faith and Credit to California's Fair Employment and Housing Act when the said Court, to Petitioner's detriment:

a) Used Texas law to decide whether for purposes of the said Act there existed an employment relationship between Petitioner Claudine Woolf and Respondent Mary Kay Inc.; and

b) Set aside the jury's verdict that such employment relationship did exist, which verdict was supported by correct, unobjected-to jury instructions and by substantial evidence?

LIST OF PARTIES

Claudine Woolf, a resident of California.

Mary Kay Inc., a Delaware Corporation with its principal place of business in Dallas, Texas.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	vi
Citations of Reports in the Case	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	4
1. The Parties	4
2. Facts Relevant to the Issues Presented for Review	4
3. Course of Prior Proceedings	8
Reasons for Granting the Writ	11
1. The Case Presents an Important Application of the Full Faith and Credit Clause of the Constitution.	11
2. The Texas Court of Appeals Denied Full Faith and Credit to the California Statute When that Court Used Texas Law Instead of California Law to Determine Whether, for Purposes of the California Statute, an Employment Relationship Existed Between the Parties	12

TABLE OF CONTENTS

Page

3. The Texas Court of Appeals Denied Full Faith and Credit to the California Statute When that Court Erroneously Set Aside the Jury's Special Finding that There Existed an Employment Relationship Between the Parties for Purposes of the California Fair Employment and Housing Act. That Verdict Is Based Upon a Correct Jury Instruction, to Which Respondent Mary Kay Inc. did Not Object, and Is Supported by Substantial Evidence. 14

Conclusion: The Writ Should Be Granted. 18

TABLE OF CONTENTS

APPENDICES

Page

Order of Texas Supreme Court Denying Petition for Hearing A-1

Opinion of Texas Court of Appeals A-2

TABLE OF AUTHORITIES

Page

Cases

Adam v. Saenger, 303 U.S. 59 (1938) 1

BKU Enterprises v. Job Service North Dakota, 513 N.W. 2d 382 (N.D. 1994) 16

Bevan v. California Employment Stabilization Commission, 139 Cal. App. 2d 668 (1956) 16

Borello & Sons v. Department of Industrial Relations, 48 Cal. 3d 341 (1989) 16

Carroll v. Lanza, 349 U.S. 408 (1955) 17

Clark v. Willard, 292 U.S. 112 (1934) 1

Fischer v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590 (1989) 13

Gonzalez v. Workers' Compensation Appeals Board, 46 Cal. App. 4th 1584 (1996) 16

Hughes v. Fetter, 341 U.S. 609 (1951) 11,17

Limestone Products Distribution, Inc. v. McNamara, 71 S.W. 3d 308 (Tex 2002) 13

Mary Kay, Inc. v. Claudine Woolf, 146 S.W. 3d 813 (2004) 1

NLRB v. Hearst, 322 U.S. 111 (1944) 13

Press Publishing Co. v. Industrial Accident Commission, 190 Ca. 114 (1922) 16

R.W. Riskin v. Industrial Accident Commission, 23 Cal. 2d 248 (1943) 16

Truesdale v. Workers Compensation Appeals Board, 190 Cal. App. 3d 608 (1987) 16

TABLE OF AUTHORITIES

Page

Constitutional Provisions and Statutes

U.S. Constitution, Article IV, Section 1 ..... 1, 11

28 U.S.C. 1257 ..... 1, 2

28 U.S.C. 1738 ..... 2, 9

California Government Code, § 12900, et seq. ... 1

CITATIONS OF REPORTS IN THE CASE

The opinion of the Texas Court of Appeals in this case is in the appendix to this petition at pages A-2 to A-13. The order of the Texas Supreme Court denying Claudine Woolf's petition for review is included in this appendix at page A-1.

The Texas Court of Appeals' opinion in this case is thus far reported in the following publications and services: *Mary Kay Inc., v. Claudine Woolf*, 146 S.W. 3d 813 (2004); 2004 Tex. App. Lexis 9238; 16 Am. Disabilities Cas. (BNA) 271.

JURISDICTION

28 U.S.C. 1257 grants to this Court jurisdiction to review on certiorari final judgments rendered by the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution...or statutes... of the United States." See also, with particular reference to Full Faith and Credit, *Clark v Willard*, 292 U.S. 112 (1934) and *Adam v. Saenger*, 303 U.S. 59 (1938).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article IV, Section 1 of the Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Based upon this provision the Congress enacted 28 U.S.C. 1738, which provides:

"*§1738. State and Territorial statutes and judicial proceedings; full faith and credit.*

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Plaintiff's cause of action in this case is based on the California Fair Employment and Housing Act, California Government Code §§12900, et seq., and in particular upon section 12940 thereof, which provides:

"§12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions

"It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State

of California:

"(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

"(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

"(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the

discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations."

STATEMENT OF THE CASE

1. The Parties

There are only two parties to this case, Claudine Woolf and Mary Kay Inc.

Claudine Woolf was born in 1970. At all times pertinent hereto she resided in Martinez, California. Mary Kay Inc. is a Delaware Corporation with its principal place of business in Dallas, Texas.

2. Facts Relevant to the Issues Presented for Review.

Respondent Mary Kay Inc. (hereinafter "Mary Kay") was founded in 1963 (3 RR 166-167). It is engaged in the manufacture and sale of women's cosmetics (Ibid). Its products are sold throughout the United States and in Canada and Mexico (Pl Ex. 7, Schedule, p. ii). Mary Kay markets the cosmetics it produces through a network of some 400,000 allegedly independent sellers (Appellant's Brief, 01/16/04, p.2.). All of these sellers are women. They sell the product door-to-door directly to the ultimate consumer of Mary Kay's beauty products (Def Ex. 1, ¶ A.2.). These saleswomen are referred to as Beauty Consultants (Def Ex. 1). Each signs a contract with Mary Kay, which contract among other things provides that the Beauty Consultant is not an employee of Mary

Kay, but is an independent contractor. The Beauty Consultants support their business on the margin between the price at which they purchase beauty products from Mary Kay and the price at which they sell these products to the ultimate consumer.

Several steps up the ladder from Beauty Consultant is the Unit Sales Director. A Unit Sales Director is a Beauty Consultant who has recruited at least 30 women to act as Beauty Consultants for Mary Kay products. The unit of thirty must purchase at least a total of $4,000 worth of Mary Kay products per month in order for the Unit Sales Director to retain her status as Unit Sales Director (Pl Ex. 7 ¶ 10.2 [viii]). The Unit Sales Directors sign new agreements with Mary Kay. These printed agreements likewise recite that the Unit Sales Director is an independent consultant, not an employee. Unit Sales Directors receive a commission on the purchases which members of the Unit Sales Director's unit make from Mary Kay (Pl Ex. 7, Schedule of Commissions). There are yet higher levels in the Mary Kay marketing hierarchy, which levels are attained by recruiting more and more Beauty Consultants.

Petitioner Claudine Woolf was born in Oakland, California in 1970. She obtained from the University of California at Santa Barbara a degree of Bachelor of Science in Psychology in June of 1992, (RR 11/14/02, p.107) and was married in September of that year (Ibid). Her first son was born in August of 1994 (Ibid, p.108).

In January of 1995 she became a Mary Kay Beauty Consultant (RR 11/13/02, p.109). Constantly giving skin care classes, Woolf after only a few months had recruited twelve Beauty Consultants and received from Mary Kay free use of a pink Cadillac leased by Mary Kay (Ibid, pp. 130-132). By June of 1996 Woolf had recruited 30 Beauty Consultants and in September of that year she became a Unit Sales Director or simply a "Director." (Ibid, p. 134). On September 1, 1996 she

signed a Sales Director Agreement with Mary Kay (Pl Ex. 7). To maintain directorship status for Woolf, Woolf's unit had to buy $4,000 per month in Mary Kay product from Mary Kay (Ibid, p. 139).

In November of 1996, Woolf had a miscarriage (RR 11/14/02, p. 182). On March 13, 1997 she wrote to Mary Kay Ash, the founder of Mary Kay, and informed Mary Kay Ash that Woolf would shortly be having a tumor removed from her breast (Ibid, p.183). Shortly before removal of the tumor, Woolf learned that she was pregnant again (Ibid, p. 188). After removal of the tumor, it was determined that Woolf had a very aggressive form of cancer. In order to prevent spread of the disease she underwent a mastectomy on April 18, 1997 (Ibid, p. 196).

Despite these events, Woolf's unit met its $4,000 per month quota in March, April and May of 1997 (Ibid, pp. 199, 201). However, in April or May of 1997, Woolf received advice from a Mary Kay agent that Woolf would have to meet certain sales minimums in order to retain use of the Cadillac (Ibid, pp. 201-202). Mary Kay Inc. was fully aware of Woolf's condition (Ibid, 209).

In May of 1997, Woolf began chemotherapy treatments (Ibid, p. 216). She would rest for six weeks between each round of chemotherapy (Ibid, p. 217), of which she had four (Ibid, p. 218). During this time Woolf would meet with leaders of her unit for the purpose of keeping up production of her unit's sales of Mary Kay products (Ibid, p. 219). However, by September of 1997 Woolf's unit was not meeting the prescribed $4,000 per month minimum sales (Ibid, p. 222). On October 25, 1997 she safely delivered her baby (Ibid, p. 223). Woolf's unit did not meet its quota for September or October of 1997 (Ibid, p. 228), in which months sales were only about $1,200 to $1,800 (Ibid, p. 229). On November 12, 1997, Mary Kay sent

Woolf a letter in which Woolf was told that unless Woolf's unit's November sales were up to the minimum, "relinquishment of your Directorship and a rebuilding effort would follow." (Pl Ex. 13; RR 11/14/02, p.229). Woolf immediately wrote back requesting exceptions to policy in view of her illness and hospitalization (Pl Ex. 14; RR 11/14/02, p 233). In that letter she notes that Mary Kay had taken back the Cadillac. Shortly after Woolf sent Exhibit 14, Woolf received a telephone call from Sharon Davis of Mary Kay, advising that Mary Kay would be monitoring Woolf's sales on a month to month basis. However on December 15, 1997, Mary Kay sent Woolf a letter advising that if Woolf's unit did not meet minimum production of $4,000 for December, 1997, "you will be asked to relinquish your Directorship and requalify." (Pl Ex. 18). There were only a few days left in December when Woolf received the letter. Woolf regarded the letter as a termination of her directorship (RR 11/19/02, p. 249).

On January 11, 1998 Woolf, through counsel, wrote to Mary Kay and advised that Woolf no longer wanted to work for Mary Kay (Def Ex. 18).

Shortly after the letter of December 15, 1997, Woolf's Mary Kay director, Carol Taylor, sent a letter to the Beauty Consultants Woolf had recruited (RR 11/19/02, p. 253). Woolf, on January 5, 1998, called Mary Kay and complained that this was done without Woolf's permission (Ibid). On January 12, 1998, Woolf through counsel wrote to Mary Kay and advised that Woolf no longer wished to work for Mary Kay (Def Ex. 18). Woolf regarded her January 12, 1998 letter to Mary Kay as Woolf's written notice of termination of the directorship pursuant to paragraph 10.1 of the Sales Director Agreement (RR 11/19/02, p. 254). Woolf heard nothing from Mary Kay in February of 1998. At the end of March of 1998, Mary Kay sent Woolf a letter stating that Woolf's directorship was still in

effect and that Mary Kay had granted Woolf an exception to the production requirement due to Woolf's illness (Pl Ex. 25).

Woolf had additional surgery for cancer in 1999 (RR 11/19/02, pp. 259-260). The tumor that was removed at that time, however, was benign. By the time of trial in November of 2002, Woolf had completed a 5 year period without cancer and was placed by the doctors on an annual basis for cancer checkups (RR 11/19/02, p. 260). As of the time of trial the baby she had delivered while she was suffering from cancer was five years old and was growing normally (Ibid, p. 224).

3. Course of Prior Proceedings

Woolf filed this action in 1998 in the Superior Court for the State of California, County of Contra Costa. On motion of Mary Kay and then-defendant Sharon Davis of Mary Kay, who has since been dismissed from the action, the California court abated the California action and advised plaintiff Woolf that Woolf could pursue her action in Texas state court if Woolf so wished. This ruling was based on section 17 of the parties' September 1, 1996 Sales Director Agreement (Def Ex. 2, ¶ 17). That agreement provides that:

> This Agreement ... shall be governed by the laws of the State of Texas as to all matters...of validity, construction, effect and performance. The parties further agree that if any dispute or controversy should arise between them concerning any matter relating to this Agreement, that any issues which either party may elect to submit for legal jurisdiction shall be submitted to the jurisdiction of the courts of the State of Texas and the parties agree that the proper venue shall be Dallas, Dallas County, Texas.

Woolf filed in Dallas county on July 26, 2000. About nine months later she amended her Texas state court complaint to allege a violation of 42 U.S.C. 1981. On this basis, Mary Kay Inc. removed the action to federal court, where the court granted summary judgment on Woolf's 42 U.S.C. 1981 claim and remanded the case to Texas state court.

The case went to trial before Honorable Catherina Haynes and a jury in Dallas County in November of 2002. The sole theory of liability submitted to the jury was violation of California Government Code §§12900, et seq., known as the Fair Employment and Housing Act (CR 2714;2717).

After six days of trial the jury found (6 CR 1922-26):

1. That Claudine Woolf was an employee of Defendant Mary Kay Inc.

2. That Mary Kay Inc. failed to accommodate Plaintiff's physical disability, causing damages to Plaintiff.

3. That Mary Kay Inc. did not fail to grant leave to Claudine Woolf for her pregnancy-related disability.

4. That Claudine Woolf's damages were as follows:

a. Past mental anguish: $500,000.

b. Probable future mental anguish: $500,000.

c. Lost wages incurred in the past: $163,988.

d. Probable future lost wages: $82,083.

5. That Mary Kay Inc. acted with oppression and malice in the violations which the jury found.

6. That Mary Kay Inc. made good faith efforts to comply with laws prohibiting discrimination but that a Mary Kay managerial agent acted contrary to those efforts.

7. That Claudine Woolf should receive $10 million as punitive damages.

8. That Claudine Woolf is not estopped from claiming that she is a Mary Kay Inc. employee by her representations to the IRS. (6 CR 1922-1926).

Judgment was entered in accordance with the verdict. However in post-trial proceedings Judge Haynes granted j.n.o.v. in favor of Mary Kay Inc. on Woolf's claim for punitive damages (9 CR 2701). In those proceedings, Judge Haynes awarded to Woolf attorney fees in the amount of $325,000 (9 CR 2701-3).

Both parties appealed. The Texas Court of Appeals held as a matter of law that Woolf was not an employee of Mary Kay Inc. even for the purposes of the California Fair Employment and Housing Act, and therefore entered judgment for Mary Kay Inc. on all of Woolf's claims. That opinion is appended hereto. On January 14, 2005 the Texas Supreme Court denied Woolf's petition for review, also appended hereto.

Woolf now brings the present certiorari petition.

REASONS FOR GRANTING THE WRIT

1. This Case Presents an Important Application of the Full Faith and Credit Clause of the Constitution.

As Justice Black explained in *Hughes v. Fetter*, 341 U.S. 609, 71 S Ct. 980 (1951), the United States are not independent sovereignties but are members of a single Union and must respect and enforce the laws of one another. This is not a matter of comity but is a requirement of the Constitution, set forth in Article IV, section 1. The case at bar presents an egregious departure from that principle. The case at bar is one in which local interests have clearly obstructed and curtailed the regular administration of justice. Reading the record in this case as a whole, one sees nothing except a flat refusal of the Texas Court of Appeals to enforce this California Act against Mary Kay Inc. This is not a matter of conflicting policies between California and Texas, for Texas has legislation not dissimilar to California's Fair Employment and Housing Act. This is not an issue of misconstruction of California law, but disregard of it, in flagrant violation of the Constitution. This Court is as well able as the Texas Court of Appeals to decide issues of California law, but the problem in this case is not a misinterpretation or misconstruction of a sister state's law but a refusal to apply that law against a local corporation. This Court will not tell a Texas court how to decide issues of Texas law, as the question of whether or not Claudine Woolf was an employee of Mary Kay for purposes of the California Fair Employment and Housing Act is very clearly not an issue of Texas law. This case cries out for the intervention of this Court to resolve what is fundamentally an interstate conflict, a conflict arising from the Texas Court of Appeals' refusal to honor California's legitimate interest in protecting its residents against discrimination. It was in California that Claudine Woolf and her recruits sold Mary Kay's products, not Texas. If Mary Kay

wants to do business in California, it must live up to California's laws. This is a suit for violation of a California statute, and is not a suit for breach of the Sales Director Agreement between Woolf and Mary Kay. That contract in paragraph 10.2 (v) authorizes Mary Kay to terminate directors who in Mary Kay's sole judgment have become incapacitated. For all the reasons which supported adoption of the Full Faith and Credit Clause in the Constitution, this Court should take the present case.

2. The Texas Court of Appeals Denied Full Faith and Credit to the California Statute When that Court Used Texas Law to Determine Whether an Employment Relationship Existed Between the Parties.

If Claudine Woolf had struck a California resident in her Cadillac and that resident sued Mary Kay for damages, the court would apply one set of criteria to determine whether Mary Kay is vicariously liable for Woolf's actions. If Mary Kay paid $10,000 to Woolf in respect of sales by Mary Kay to Beauty Consultants recruited by Woolf, and the Internal Revenue Service assessed a tax against Mary Kay for non-payment of federal income tax withholding and social security tax withholding and contributions with respect to that $10,000 payment, another set of criteria will determine whether Woolf is an employee of Mary Kay and whether Mary Kay owes the tax. When Mary Kay terminates Woolf's Director Agreement because Woolf has missed her monthly quota due to temporary hospitalization and incapacity of Woolf, whether Mary Kay is liable to Woolf for the damages such termination causes Woolf will be decided by a third set of criteria.

The point is that Woolf may be Mary Kay's employee for one purpose and not for another. Nor does any law or rule

require that the results in such disputes be consistent with one another. In *NLRB v. Hearst*, 322 U.S. 111, 64 S Ct 851 (1944), this Court noted that, "Few problems in the law have greater variety of application and conflict in result than cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." (Id. at 856).

Here the issue is whether Woolf was an employee of Mary Kay for purposes of California's Fair Employment and Housing Act. That issue must be determined by reference to the aims and purpose of that legislation. *NLRB v. Hearst*, supra, at p. 857. One of the purposes of that legislation is to keep California residents economically productive so that they do not become charges of the state. Another is the humanitarian purpose of preserving their livelihood during temporary illness. "Of course, in the instant case, the determination of whether Dr. Tischler is an employee will be made in the context of the purposes behind the FEHA, not workers' compensation." *Fischer v. San Pedro Peninsula Hospital*, (1989) 214 Cal. App 3d 590, 608 footnote 6.

Here the Texas Court of Appeals used Texas law to determine whether Woolf was Mary Kay's employee. This is an error in choice of law, but it is one of Constitutional dimensions in that it does not take into account the aims and purposes of the California Act.

Throughout her brief filed in the Texas Court of Appeals, Woolf urged that Court to follow California law, particularly its case of *Borello & Sons v. Department of Industrial Relations*, (1989) 48 Cal. 3d 341, 349-360 which is controlling on the employment issue in this case. Instead, the Texas Court relied on the Texas case of *Limestone Prod. Distrib. Inc. v. McNamara*, 71 S.W. 3d 308 (Tex 2002), which has no connection to the California Act.

Without mentioning full faith and credit by name, Woolf did state in her brief in the Texas Court of Appeals that California public policy requires a finding of employment (March 16, 2004 Appellee's Answering Brief, p. 17 and following). Throughout her brief Woolf urged that Court to decide the employment issue in the light of the California public policy underlying the Fair Employment and Housing Act (Ibid).

3. The Texas Court of Appeal Denied Full Faith and Credit to the California Statute When that Court Erroneously Set Aside the Jury's Special Finding that There Existed an Employment Relationship Between the Parties for Purposes of the California Fair Employment and Housing Act. That Verdict is Based Upon a Correct Jury Instruction, to Which Respondent Mary Kay Inc. Did Not Object, and Is Supported by Substantial Evidence.

On the employment issue, Judge Haynes instructed the jury in this case as follows (CR 1922):

"QUESTION NO. 1

"Do you find that Claudine Woolf was an employee of Defendant Mary Kay Inc.?

"An employee is one who, in rendering services, is subject to the employer's right to control the manner and means of accomplishing the result desired.

"By contrast, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents her employer or principal only as to the results of her work, and not as to the means by which it is to be accomplished.

"Other factors to be taken into consideration in determining whether a person is an employee or independent contractor are:

"(a) Whether the person was engaged in a distinct occupation or business;

"(b) Whether the work usually done by the person is under the direction of the company or without supervision;

"(c) The skill required in the particular occupation or business;

"(d) Whether the person or the company supplies the instrumentalities, tools and the place of work;

"(e) The length of time for which the services are to be performed;

"(f) The method of payment, whether based on time worked or by the job;

"(g) Whether the work is part of the regular business of the company;

"(h) Whether the parties believed they were creating a relationship of employer-employee or independent contractor, including representations made by either the person or the company with respect to the persons' status as an independent contractor or employee.

"Answer "yes" or "no"

"Answer: Yes."

The record is not clear on whether this is Texas law or California law or both. The record is clear that neither party

objected to this instruction.

The jury answered "yes" to this question. On each of the factors mentioned in the instruction there is substantial evidence in the record supporting the verdict in Woolf's favor.

The 30 day without-cause termination provision in the Sales Director Agreement gives Mary Kay control of Woolf's actions. Pl Ex. 7, ¶ 10.1. So the California courts have interpreted such provisions. *Truesdale v. Workers' Comp. Appeals Board*, 190 Cal. App. 3d 608, 616; *Press Publishing Co. v. Industrial Accident Commission*, (1922) 190 Cal 114, 118-120, 122; *R.W. Riskin v. Industrial Accident Commission*, (1943) 23 Cal 2d 248, 252-254; *Bevan v. California Employment Stabilization Comm.*, (1956) 139 Cal App 2d 668, 683. See also *BKU Enterprises v. Job Service N.D.*, 513 N.W. 2d 382, 388. *Gonzalez v. Workers' Comp. Appeals Board*, (1996) 46 Cal. App 4th 1584, 1593.

Mary Kay tightly controlled the means by which the Beauty Consultants and Unit Sales Directors did their work. Woolf testified that she was required to attend week-long seminars and meetings (e.g. RR 11/18/02, pp. 12; 13; 16; 18 ["the training center"]; 25; 27; 36-37; 39; & RR 11/13/02, pp. 107; 112; 121; 165-168), where the sales persons received instruction from Mary Kay on how to market the product. She was not permitted to sell to retail establishments but could only sell to the ultimate consumer (RR 11/18/02, pp.23-24). Woolf could not set up her own retail outlet. Woolf could not sell any other manufacturer's product, be they automobile tires, to her Beauty Consultants (Pl Ex. 7, ¶ 8). Mary Kay told Woolf how to dress, what perfume to wear, how to speak (RR 11/14/02, pp. 174-177).

Turning to the lettered subdivisions of Judge Haynes' charge, it is clear that the sales force was not a distinct

occupation or business, but was an integral, ongoing, indispensable part of Mary Kay's business (a). Mary Kay could not long manufacture products unless it sold them (3 RR18:20-19:8).

No particular skill is required for entry into the Mary Kay sales force (c). Mary Kay supplies the products to be sold, and dictates to whom and on what financial terms the products are to be sold (d) (RR 11/18/02, pp. 23-24). The tools of this trade are intangible. They consist of salesmanship, and Mary Kay teaches salesmanship to its selling force (d) (e.g. RR 11/13/02, pp. 165-168). Services are rendered not on a spot or job basis, but for the indefinite future (e) (Pl Ex. 7 ¶ 9). Payment to directors is on a commission basis, depending on sales to that director's recruits (Ibid, Schedule of Commissions). This is neither hourly compensation nor payment by the job (f). The work of the sales force is an integral part of Mary Kay's business (g) (Appellant's Brief, 01/16/04, p.2). Subdivision (h) refers to the recitations in the printed agreements that directors and beauty consultants are not employees. This factor goes on Mary Kay's side of the scales. But the jury found that it was outweighed by the other factors.

The Court of Appeals' holding that there is no evidence to support the jury's finding of an employment relationship for purposes of California's Fair Employment and Housing Act is indefensible.

In his dissent in *Carroll v. Lanza*, 349 U.S. 408 , 75 S Ct 806 (1955), Justice Frankfurter collected all of this Court's cases up to that time in which it was alleged that a state court had denied full faith and credit to the statute of another state. Elsewhere, in his dissent in *Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980, he divides these cases into commercial cases, workman's compensation cases, and transitory tort cases. The case at bar probably falls most clearly into the last of these

categories. California has provided by statute a damages remedy for discrimination, the Texas trial court and jury enforced the remedy, and the Texas Court of Appeals has denied the statute Full Faith and Credit, for the benefit of a local corporation, and to the detriment of a very deserving plaintiff.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted.

April12, 2005 Respectfully,

Lawrence Alioto

Attorney for Petitioner